



6351-01-P

## COMMODITY FUTURES TRADING COMMISSION

17 CFR Part 23

RIN 3038-AE00

Swap Dealers and Major Swap Participants; Clerical or Ministerial Employees

AGENCY: Commodity Futures Trading Commission.

ACTION: Proposed rule.

SUMMARY: The Commodity Futures Trading Commission (Commission or CFTC) is proposing to amend its regulations (Proposal) to clarify certain responsibilities of a swap dealer (SD) or major swap participant (MSP) regarding its employees who solicit, accept or effect swaps in a clerical or ministerial capacity.

DATES: Comments must be received on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments, identified by RIN number 3038-AE00, by any of the following methods:

- Agency Web Site: <http://www.cftc.gov>.
- Mail: Secretary of the Commission, Commodity Futures Trading

Commission, Three Lafayette Centre, 1155 21st Street NW, Washington, DC 20581.

- Hand Delivery/Courier: Same as Mail, above.
- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow instructions

for submitting comments.

All comments must be submitted in English, or if not, accompanied by an English translation. Comments will be posted as received to [www.cftc.gov](http://www.cftc.gov). You should submit

only information that you wish to make available publicly. If you wish the Commission to consider information that is exempt from disclosure under the Freedom of Information Act, a petition for confidential treatment of the exempt information may be submitted according to the procedure established in CFTC Regulation 145.9.<sup>1</sup>

The Commission reserves the right, but shall have no obligation, to review, pre-screen, filter, redact, refuse or remove any or all of your submission from [www.cftc.gov](http://www.cftc.gov) that it may deem to be inappropriate for publication, such as obscene language. All submissions that have been redacted or removed that contain comments on the merits of the rulemaking will be retained in the public comment file and will be considered as required under the Administrative Procedure Act and other applicable laws, and may be accessible under the Freedom of Information Act.

FOR FURTHER INFORMATION CONTACT: Christopher W. Cummings, Special Counsel, (202) 418-6700, [ccummings@cftc.gov](mailto:ccummings@cftc.gov), or Barbara S. Gold, Associate Director, (202) 418-6700, [bgold@cftc.gov](mailto:bgold@cftc.gov), Division of Swap Dealer and Intermediary Oversight, Commodity Futures Trading Commission, 1155 21st Street, NW, Washington, DC 20581.

#### SUPPLEMENTARY INFORMATION:

##### **I. Background**

The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act)<sup>2</sup> was signed into law July 21, 2010. The Dodd-Frank Act amended the Commodity

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<sup>1</sup> The Commission's regulations are found at 17 CFR Ch. I (2012) and can be accessed through the Commission's Web site, [www.cftc.gov](http://www.cftc.gov).

<sup>2</sup> See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010). The text of the Dodd-Frank Act can also be accessed through the Commission's Web site.

Exchange Act (CEA or Act)<sup>3</sup> to require the registration of SDs and MSPs, and to establish a comprehensive new regulatory framework for swaps. One such amendment was new CEA Section 4s(b)(6), which states: that except to the extent otherwise specifically provided by rule, regulation, or order, it shall be unlawful for a swap dealer or a major swap participant to permit any person associated with a swap dealer or a major swap participant who is subject to a statutory disqualification to effect or be involved in effecting swaps on behalf of the swap dealer or major swap participant, if the swap dealer or major swap participant knew, or in the exercise of reasonable care should have known, of the statutory disqualification [“Prohibition”].

A related amendment that the Dodd-Frank Act made was to add a definition of “associated person of a swap dealer or major swap participant” in new CEA Section 1a(4), which states that the term “associated person of a swap dealer or major swap participant” means a person who is associated with a swap dealer or major swap participant as a partner, officer, employee, or agent (or any person occupying a similar status or performing similar functions), in any capacity that involves the solicitation or acceptance of swaps; or the supervision of any person or persons so engaged. Other than for purposes of CEA section 4s(b)(6), the term “associated person of a swap dealer or major swap participant” does not include any person associated with a swap dealer or major swap participant the functions of which are solely clerical or ministerial.

Thus, except to the extent that the Commission specifically provided by rule, regulation, or order, an SD or MSP would be subject to the prohibition against permitting

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<sup>3</sup> 7 U.S.C. 1 et seq. The CEA also can be accessed through the Commission’s Web site.

a person associated with the SD or MSP (including a person employed in a clerical or ministerial capacity) to effect or be involved in effecting swaps if the associated person were subject to a statutory disqualification.

On January 19, 2012, the Commission published in the Federal Register regulations that provide for the registration of SDs and MSPs.<sup>4</sup> Among these new regulations were Regulation 1.3(aa)(6), which amended the existing definition of “associated person” in the Commission’s regulations to include associated persons of SDs and MSPs, and Regulation 23.22, which incorporated the prohibition set forth in CEA Section 4s(b)(6). Specifically, Regulation 1.3(aa)(6) (17 CFR 1.3(aa)(6) provides that the term “associated person” means any natural person who is associated in any of the following capacities with a swap dealer or major swap participant as a partner, officer, employee, agent (or any natural person occupying a similar status or performing similar functions), in any capacity that involves the solicitation or acceptance of swaps (other than in a clerical or ministerial capacity); or the supervision of any person or persons so engaged.

The exclusion in Regulation 1.3(aa)(6) from the definition of associated person of an SD or MSP for persons who act in a clerical or ministerial capacity is consistent with the definition (and exclusion for clerical or ministerial activity) in the other provisions in Regulation 1.3(aa) that define the term “associated person” in the context of other Commission registrants.<sup>5</sup>

## **II. The Proposal**

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<sup>4</sup> See 77 FR 2613 (Jan. 19, 2012).

<sup>5</sup> See also CEA Section 4k(1), which excludes from associated person registration a person who, in a clerical or ministerial capacity, solicits or accept customer orders for a futures commission merchant or an introducing broker.

Regulation 23.22, by its terms, applies to an associated person of an SD or MSP “as defined in section 1a(4) of the Act and [Regulation] 1.3(aa).” Because Regulation 1.3(aa)(6) contains a general exclusion from the associated person definition for a person employed in a clerical or ministerial capacity, and the exclusion in CEA Section 1a(4) must be read in conjunction with CEA Section 4s(b)(6), the National Futures Association (NFA)<sup>6</sup> has recommended that the Commission clarify that the prohibition in CEA Section 4s(b)(6) does not bar association with an SD or MSP by employees who are employed in a clerical or ministerial capacity.

In light of NFA’s recommendation, and in accordance with the language in CEA Section 4s(b)(6) that qualifies the Prohibition (“Except to the extent otherwise specifically provided by rule, regulation, or order”), the Commission is proposing to amend paragraph (a) of Regulation 23.22 to clarify that the Prohibition does not apply to an individual employed by an SD or MSP in a clerical or ministerial capacity.<sup>7</sup>

### **III. Related Matters**

#### **A. Regulatory Flexibility Act**

The Regulatory Flexibility Act (RFA)<sup>8</sup> requires that agencies, in proposing regulations, consider the impact of those regulations on small businesses.<sup>9</sup> The

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<sup>6</sup> Letter from Thomas W. Sexton, Senior Vice President and General Counsel, NFA, to Gary Barnett, Director of the Division of Swap Dealer and Intermediary Oversight, dated November 12, 2012. NFA is a registered futures association (and the sole association so registered) under CEA Section 17.

<sup>7</sup> In this regard, the Commission notes that pursuant to this authority in CEA Section 4s(b)(6), it previously adopted an exception from the Prohibition for a person already listed as a principal of, or already registered as an associated person of, another Commission registrant, notwithstanding a statutory disqualification. See Regulation 23.22(b), proviso.

<sup>8</sup> 5 U.S.C. 601 et seq. (2006).

Commission previously has determined that SDs and MSPs are not “small entities” for RFA purposes.<sup>10</sup> Moreover, as is explained below, if adopted, the Proposal will not have a significant economic impact on any person who would be affected thereby, because it will not impose any additional operational requirements or otherwise direct or confine the activities of affected persons. Accordingly, the Chairman hereby certifies pursuant to 5 U.S.C. 605(b) that the Proposal will not have a significant economic impact on a substantial number of small entities.

B. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA)<sup>11</sup> imposes certain requirements on Federal agencies (including the Commission) in connection with their conducting or sponsoring any collection of information as defined by the PRA. The Commission believes that the Proposal will not impose new recordkeeping or information collection requirements that require approval by the Office of Management and Budget under 44 U.S.C. 3501, et seq. Accordingly, the PRA does not apply to this rulemaking.

C. Cost-Benefit Considerations

CEA Section 15(a) requires the Commission to consider the costs and benefits of its actions before issuing a rulemaking under the CEA. CEA Section 15(a) further specifies that the costs and benefits shall be evaluated in light of five broad areas of market and public concern: (1) protection of market participants and the public; (2) efficiency, competitiveness and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. The

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<sup>9</sup> By its terms, the RFA does not apply to “individuals.” See 48 FR 14933, n. 115 (Apr. 6, 1983).

<sup>10</sup> See 77 FR 2613, 2620 (Jan. 19, 2012).

<sup>11</sup> 44 U.S.C. 3501 et seq.

Commission considers the costs and benefits resulting from its discretionary determinations with respect to the Section 15(a) factors.

Summary of the Proposal. As is explained above, the Proposal would make a clarifying change to the text of one of the Commission's regulations that were adopted to reflect changes made to the CEA by the Dodd-Frank Act, by specifying that the prohibition against an SD or MSP permitting a statutorily disqualified person to associate with it does not include a person employed in a clerical or ministerial capacity.

Costs. With respect to costs, the Commission believes that the Proposal will not impose any costs. This is because the Proposal would clarify that an SD or MSP need not consider whether CEA section 4s(b)(6) applies to employees performing clerical or ministerial duties. Thus the Commission proposes that there will be little (if any) costs to persons who will be affected by the Proposal.

Benefits. With respect to benefits, the Commission proposes that the Proposal will benefit SDs and MSPs by reducing the search costs associated with determining whether a clerical or ministerial employee is statutorily disqualified. This, in turn, mitigates the cost of compliance with CEA Section 4s(b)(6).

Public Comment. The Commission invites public comment on its cost-benefit considerations. Commenters are also invited to submit any data or other information that they may have quantifying or qualifying the costs and benefits of the Proposal with their comment letters.

List of Subjects in 17 CFR Part 23

Associated persons, Commodity futures, Major swap participants, Ministerial or clerical employees, Registration, Statutory disqualification, Swap dealers, Swaps.

For the reasons presented above, the Commission hereby proposes to amend chapter I of title 17 of the Code of Federal Regulations as follows:

**PART 23 – SWAP DEALERS AND MAJOR SWAP PARTICIPANTS**

1. The authority citation for part 23 continues to read as follows:

Authority: 7 U.S.C. 1a, 2, 6, 6a, 6b, 6b–1, 6c, 6p, 6r, 6s, 6t, 9, 9a, 12, 12a, 13b, 13c, 16a, 18, 19, and 21.

2. Section 23.22 is amended by revising the section heading and paragraph (a) to read as follows:

§23.22 Prohibition against statutory disqualification in the case of an associated person of a swap dealer or major swap participant.

(a) Definition. For purposes of this section, the term “person” means an “associated person of a swap dealer or major swap participant” as defined in section 1a(4) of the Act and § 1.3(aa)(6) of this chapter, but does not include an individual employed in a clerical or ministerial capacity.

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Issued in Washington, DC, on March 27, 2013, by the Commission.

Christopher J. Kirkpatrick,  
Deputy Secretary of the Commission.

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